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95-1663

No. 95-

Supreme Court, U.S.
FILED
APR 15 1996
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ANTHONY P. CATALFO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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April 1996

52pp

QUESTIONS PRESENTED

1. Whether the decision of the Court of Appeals holding the Appellant's Scheme cognizable as wire fraud is contrary to statute and controlling Supreme Court and Circuit precedent?

2. Whether the decision of the Court of Appeals upholding the District Court's jury instruction on intent is contrary to controlling Supreme Court and Circuit precedent?

3. Whether the decision of the Court of Appeals has sanctioned a departure from the accepted and usual course of judicial proceedings by a lower court, requiring the exercise of the Supreme Court's power of supervision in that the decision below upholding the sentence is contrary to Circuit precedent and misapplies the guidelines?

4. Whether Petitioner's right to due process under Amendment 5, U.S. Constitution was violated because Petitioner was not permitted to present his theory of defense?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (petitioner Catalfo and the United States). Petitioner was indicted, stood trial and appealed alone. Petitioner knows of no related case.

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ANTHONY P. CATALFO respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on August 30, 1995, affirming his conviction for wire fraud.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (per Flaum, J. with Manion Circuit Judges

and Sharp, District Judge, sitting by designation), affirming the petitioner's conviction and sentence in the United States District Court for the Northern District of Illinois, was filed on August 30, 1995. It is published as *United States v. Catalfo,* 64F3d 1070; a copy is attached as Appendix A. The district court wrote no opinion.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on August 30, 1995, the Court of Appeals denied petitioner's timely-filed petition for rehearing. Appendix B. On March 11, 1996, Justice Stevens, sitting as Circuit Justice, extended the time for filing this petition to and including April 14, 1996 No. A-745; Appendix C. This petition is filed on or before that date. Rule 13.1. Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254(1).

TEXT OF STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 1343 of Title 18, United States Code provides;

§ 1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

Amendment 5 of the Constitution of the United States provides;

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment

of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

The petitioner, Anthony P. Catalfo, was convicted on six counts of wire fraud stemming from his first days as a trader at the Chicago Board of Trade. The defense was that petitioner was innocent of the charge, because while he and co-defendant Zimmerman (Who fled to Canada to avoid prosecution) had discussed their respective trading plans for that day, he knew nothing of Zimmerman's deceptions and had no part in Zimmerman's wild strategy. Most important, he had no intent to defraud anyone and had not done so, but rather that he had merely been successful in an admittedly risky short-term trading strategy.

A. Procedural History

A federal grand jury sitting in the Northern District of Illinois returned a six count indictment on July 21, 1993, charging the petitioner, Anthony P. Catalfo, with wire fraud in violation of 18 U.S.C. §1343. App. 16-35a. Following a five-day jury trial (Hon. William T. Hart, U.S.D.J., presiding), Mr. Catalfo was convicted of all counts. App 11a. A presentence report proposed addition of 14 levels to the base offense source to account for a loss of between $5 and $10 million to Lee B. stern Co. Defendant Catalfo objected to the loss addition and the lower court by memorandum opinion rejected the defense position on accountability for the loss. S.A. (attached short appendix to brief of appellant Catalfo to the court below) 6-15.

Mr. Catalfo was sentenced on June 21, 1994. S.A. 16-20. Judge Hart sentenced petitioner to serve 42 months on each

count concurrently, to be followed by three years supervised release. The court imposed no punitive fine, but levied a fine of $3,000, to be paid at $1,000 per year toward the cost of incarceration . S.A. 19-20. The timely appeal followed.

On direct appeal, the United States Court of Appeals for the Seventh Circuit affirmed in a published opinion. *United States v. Catalfo,* 64 F3d 1070 (7th Cir. 1995); Appx. A. The court held that Catalfo's scheme was cognizable as wire fraud under 18 U.S.C. §1343; the jury instruction on intent to defraud was correct and that the District Court did not misapply the sentencing guidelines.

Statement of Lower Court Jurisdiction Under Rule 14.1(g)(ii). The district court's subject matter jurisdiction was invoked in this case under 18 U.S.C. §1343, in that the indictment alleged the commission of federal criminal offenses. The jurisdiction of the court below rested upon 28 U.S.C §1291 and was timely invoked by Notice of Appeal filed after sentencing and before entry of the judgment of sentence. Fed. R., Crim. P.4(b).

B. Statement of Facts

On October 22, 1992, before 7:30 a.m., Darrell Zimmerman stepped out onto the trading floor at the CBOT. He had no authority to trade, beyond liquidating positions he currently held at Lee B. Stern & Co., a clearing house which was terminating its relationship with him for concealing his history at other firms. That very morning, he had deposited a worthless check for $50,000 in his trading account at Stern. Using two brokers, he began to buy enormous amounts of put options. Tr. 913. Zimmerman did not offset any of his options purchases by sales. 914. Using two other brokers, Zimmerman sold 12,800 futures contracts between 7:20 and 7:52, only about 800 of which he bought back. *Id.* A Dean Witter broker who cleared through Stern, among others, noticed Zimmerman's activities and notified the Stern offices. Tr. 770. Stern's floor manager took Zimmerman off the trading floor. The total premium associated with Zimmerman's options trading was $14.6 million. By the time Stern

representatives were able to offset Zimmerman's trades later that morning, Stern was liable for an $8.5 million loss. Tr. 915.

That same morning, at about 7:15 a.m., Anthony Catalfo also stepped out onto the options trading floor. He had been admitted to membership in CBOT the previous day. He had $30,000 on account at his clearing firm, Goldenberg, Hehmeyer & Co. ("GHC"). Before the market opened, he ordered a broker to buy put options, which had been accomplished before 7:30 a.m. At that hour, a new unemployment statistic (or "number") was released, which caused the value of Mr. Catalfo's options to rise. At approximately 7:39, he gave the order to sell his positions. They were sold as directed, and he "went flat in the market," that is, he was without risk to himself or his clearing firm, and had recorded a profit of $1.2 million. Mr. Catalfo had traded 4,100 contracts, with a value of about $10 million, compared to Zimmerman's 36,600 contracts with a value of about $1.3 billion. Tr. 1041.

The government attempted to show at trial that Zimmerman and Catalfo were working together to execute a single, fraudulent scheme for their mutual benefit. Mr. Catalfo testified, however, that while he and Zimmerman had discussed their respective trading plans for that day, he knew nothing of Zimmerman's deceptions and had no part in Zimmerman's wild strategy. Most important, Mr. Catalfo testified that he had no intent to defraud anyone and had not done so, but rather that he had merely been successful in an admittedly risky short-term trading strategy. The prosecutions case was that Catalfo defrauded his clearing firm from controlling its risk of loss.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals' Decision Holding the Appellant's Scheme Cognizable as Wire Fraud Is Contrary to Controlling Supreme Court and Circuit Precedent.

Granting, for purposes of this Petition, that a CBOT clearing firm's "right to control its risk of loss," slip op. at 13, is an intangible "property right" cognizable under the wire fraud statute after *McNally v. United States*, 483 U.S. 350 (1987), and *Carpenter v. United States*, 484 U.S. 19 (1987),[1] the panel's opinion is nevertheless inconsistent in two respects with the Circuit cases. First, the "scheme," as described by the government, does not involve an attempted taking of property by the defendant from the victim, but rather a fraud against the victim that puts the defendant in the position to obtain property, that is, profits, from others in a legitimate marketplace. Second, the deprivation here occurred at the hands of a non-fiduciary. Such a fraud cannot be made out by a defendant's oral misrepresentations which predate a written contract of adhesion drafted by the alleged fraud victim, where that contract contains an integration clause asserting that prior promises are of no effect. In such a case, the victim's "property rights" are limited to those created by the contract. The Circuit's decision below in effect violated Defendant Catalfo's Federal due process right not to have his contract interfered with. U.S. Constitution, Amend. 5. For either reason, the evidence did not make out a scheme to defraud punishable under 18 U.S.C. § 1343.

The Circuit's decision is inconsistent with *United States v. Walters*, 997 F.2d 1219 (7th Cir. 1993). In *Walters*, this Court

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[1] As the court below notes, slip op. at 12-13 n.5, 18 U.S.C. § 1346, enacted to overrule *McNally*, on its facts (effective November 18, 1988), brings within the contours of the mail and wire fraud laws schemes to deprive the victim of "the intangible right of honest services." Other intangible "rights" are not covered by § 1346, however, and therefore are still governed by *McNally*, unless they are intangible "property" rights under *Carpenter*.

held that § 1343's sister statute, the mail fraud law (18 U.S.C. § 1341) bars "only a scheme to obtain money or other property from the victim by fraud." *Id.* at 1227. The statute does not prohibit "a scheme in which the defendant neither obtained nor tried to obtain the victim's property." *Id.* at 1225. The meaning of "scheme or artifice to defraud" in the two statutes, mail and wire fraud, is the same. See, *e.g.*, *United States v. Cherif*, 943 F.2d 692, 695-96, 697 (7th Cir. 1991). In this case, as in *Walters*, the evidence shows "a scheme in which the defendant's profits were to come from legitimate transactions in the market, rather than at the expense of the victims." *Walters*, 997 F.2d at 1227.

Taking the evidence in the light most favorable to the government, Catalfo and Zimmerman deceived their respective clearing firms (Catalfo's was Goldenberg, Hehmeyer & Co. ["GH"]) so as to appear to have (in Zimmerman's case) or actually to have (in Catalfo's) their backing to trade freely on the CBOT. They hoped to *profit*, however, on the market, at the expense of other traders, who were not the objects or victims of the fraud scheme, as defined in the indictment and at trial. *Walters* holds that such schemes are not penalized by the mail and wire fraud statutes. The panel acknowledges Mr. Catalfo's reliance on *Walters*, slip op. at 11-12, but does not attempt to distinguish that precedent or explain how the result in this case is consistent with the principles articulated there.

The indictment also charged Mr. Catalfo with scheming to obtain money and property by employing false representations and pretenses, but the allegedly false statements were not directed at the persons from whom the money was to be obtained. Thus, the money-and-property theory runs afoul of *Walters* just as does the "scheme to defraud." Here, it was not "the financial assets of the alleged victims," *United States v. Cosentino*, 896 F.2d 301, 307 (7th Cir. 1989), that the defendants allegedly schemed to obtain, that is, assets of their

clearing firms, but rather the financial assets of other participants in the futures market.[2]

In some circumstances, not present in Mr. Catalfo's case, this Court has held that "shifting or altering of economic risk or opportunity to affect a person's financial position adversely deprives that person of money or property." *United States v. Ashman*, 979 F.2d 469, 478 (7th Cir. 1992) (brokers' "matching trades" deprived customers of property right to best price on competitive market; citing cases), *cert. denied*, 114 S.Ct. 62 (1993). To reconcile those cases with the discussion in *Walters*, which otherwise would appear to be directly contrary, it is necessary to understand those cases either as depending on fraudulent breaches of fiduciary duty or as involving attempted dishonest transfers of wealth from fraud victim to defendant. Unlike *Ashman* and the cases cited in *Ashman*, this is not a case of either kind; Mr. Catalfo did not profit, or seek to profit, at the expense of the fraud victim (his clearing firm) as Ashman did by matching his trades to the detriment of the customers for whom he was a fiduciary.

The Circuit Court relies on *United States v. Dial*, 757 F.2d 163 (7th Cir.), *cert. denied*, 474 U.S. 838 (1985), without recognizing the significance of the absence of a fiduciary relationship in the instant case. Slip op. at 13. There, a commodity broker traded on his own account ahead of the customers for whom he was a fiduciary. Moreover, he did so without the required margin, by depositing an uncertified check on insufficient funds (where "cash or cash equivalent" was required), thus defrauding his employer, the brokerage house, as well. The Court held this to be actionable under the mail and wire fraud laws as a fraud against both the customers and the employer-brokerage. Presumably because the case was decided prior to *McNally*, the *Dial* Court did not directly address all the questions the Court below has recognized as arising after the Supreme Court's decision.

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[2] If Mr. Catalfo failed in his effort to profit, the clearing firms would be left, as a result of fraud, in the position of bearing the loss -- as they were -- but that is not the criterion established by this Court's cases.

In the post-*McNally* case of *Walters*, the Circuit Court held that deprivation by a non-fiduciary of a "right to control" economic decisions is not a deprivation involving a transfer of "property" from victim to defendant, as required to establish a mail or wire fraud violation. 997 F.2d at 1226 n.3. The Circuit decision in this case, by following *Dial* and not *Walters*, deviates from the law of the Circuit on the scope of allowable prosecutions for mail and wire fraud.

The opinion below is inconsistent with Circuit precedent in another, related way. Although the government ultimately rested its theory in this case on the claim that Mr. Catalfo defrauded GH out of its right to decide whom to clear, by trading in violation of the limits it placed on him, it cannot identify any falsity in his Customer Agreement, nor any obligation which that Agreement placed on him which he then violated. The Circuit's upholding of the government's deception theory is based on Mr. Catalfo's promises that he would trade modestly. Slip op. at 13. But the Agreement on its face -- a pre-printed form obviously drafted by GH (referred to in the Agreement as "Broker") as a contract of adhesion -- has an integration clause, stating:

> This Agreement contains the entire agreement between the parties and supersedes any prior agreements between the parties as to the subject matter of this Agreement. Subject to section 4 hereof, no provision of this Agreement shall in any respect be waived, modified, altered, or changed except in a writing signed by a duly authorized officer of Broker.

GX GH1, § 15; App. 38-39.[3] Thus, under contract language of its own design, GH was not entitled to rely on any

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[3] Section 4 of the Agreement merely notes that it is subject to the rules of the CBOT and the Commodity Futures Trading Commission, even if those rules are subsequently modified. App. 38. No CBOT or CFTC rule was alleged to have been violated in this case.

commitment, promise or restriction that was not placed in writing, in that Agreement or a supplement to it.

It was not the shifting of risk *per se*, but rather doing so through active misrepresentation -- a traditional form of fraud -- that the Court upheld in *Dial* as coming within the purview of the federal fraud statutes. 757 F.2d at 169, 170. Here, by the terms of its own Customer Agreement, GH was not entitled to rely on any prior oral assurances, and the trial record reveals no active misrepresentation by Mr. Catalfo to GH in the Customer Agreement (nor does the Court below rely on any). In the absence of a fiduciary or other affirmative source of duty owing from him to GH, no cognizable "scheme to defraud" is made out in such a case. compare *id.* at 168, with *Walters*, *supra*.

Whatever inherent right it had as owner of its corporate resources to control the risks it would accept in extending its guarantee as a clearing firm, GH voluntarily and explicitly limited those rights, in a commercial contract of its own design, entered into in an arms length transaction, to the rights set forth in the Agreement. Its property rights *vis a vis* Mr. Catalfo were thus reduced to contract rights under a written instrument. No material or active misrepresentation was shown; Mr. Catalfo breached no promise he made to GH in that Agreement. This appeal raises no question of whether "the victim should have acted more prudently." Slip op. at 14. Having itself insisted that all prior oral promises be treated as void, those representations were no longer material. GH cannot have had the justifiable reliance which is necessary to establish a case of fraud based on such promises. The theory of fraud thus fails on this basis as well.

No cognizable scheme within the meaning of the wire fraud statute, as construed in the Circuit Court's prior cases, was proved in this case. The convictions must be reversed and the case remanded for entry of a judgment of acquittal.

2. The Decision Below Upholding the Jury Instruction Is Contrary to Controlling Supreme Court and Circuit Precedent.

The trial court instructed the jury, over repeated defense objection, that the wire fraud statute "can be violated" not only by showing an intent to defraud, but also "when an enormous risk of loss is placed on another person ...." Tr. 1595; App. 122, 130. The Circuit Court's opinion rejects Mr. Catalfo's argument that this instruction had the impermissible effect of permitting a conviction without a jury finding on a key, contested element of the offense, intent to defraud. The Court below would uphold the conviction by ruling that the jury could not have taken the instruction to mean what the judge who devised and delivered the charge said it meant -- without quoting or explaining the judge's actual words. This misapprehension of the record requires that rehearing be granted.

The court charged the jury, in pertinent part:

> The wire fraud statute required [sic] proof that a defendant knowingly intended to defraud another person. However, the statute can be violated when an enormous risk of loss is placed on another person even though that person does not actually suffer an actual economic loss or damage.

App. 130.[4] The Circuit's opinion concludes that the sentence beginning "However," could only have been taken by the jury as an example of how intent to defraud can be proven. Slip op. at 17-18. The Circuit denies that the instruction could have been understood, as defense counsel said the jury would understand it, as presenting an alternative path to a finding of guilt "even where there is no intent to defraud." Tr. 1584;

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[4] The final sentence, on which this argument focuses, is slightly misquoted in the panel's opinion. *See* slip op. at 16 ("does not actually suffer an economic loss"; omitting "actual" and "or damage"). The same instructions were also given to the jury in written form. *See* App. 118-122.

App. 117. The Circuit Court's holding in this regard is inconsistent with the record.

The opinion states that the trial judge "disagreed with Catalfo's suggestion" in regard to this portion of the charge, slip op. at 16, but the lower court's actual response to the objection was "I think that's right. I think that's what the law is ...." Tr. 1584; App. 117. In other words, while the trial court did disagree with the contention that the instruction was objectionable, it *agreed* with counsel's suggestion that this instruction would tell the jury that intent to defraud need not be shown where the jury concludes that the defendant deliberately shifted "an enormous risk of loss" onto another. In formulating and delivering this instruction, the lower court did not set out to offer an example (tailored to the prosecution version of the facts of this case) of how the element of intent to defraud might be satisfied. Rather, it was the trial court's expressly stated intention to tell the jury that the defendant's deliberate "imposition of risk [on another] is also an element and *can be an element*." Tr. 1450; S.A. 21 (emphasis added). Thus, the Circuit Court's decision is necessarily dependent on the conclusion that the jury *could not reasonably have understood the instruction as the lower court intended it to be understood*. This cannot be right.

The jury could easily have taken the final instruction to mean what the judge said it meant: that the defendant could be convicted of the charges in this indictment even without proof of intent to defraud, if the jury made the alternative finding that the defendant had shifted "an enormous risk of loss" to his clearing firm. Even if it is not certain, it is at least entirely possible that an attentive jury could have understood the words as the judge said he intended them -- as giving an alternative to proof of the intent element. This is particularly so where the instructions are given orally, as well as in writing. In that situation, what the speaker thinks potentially ambiguous words mean is likely to be conveyed by inflection and expression, in ways that are not necessarily captured on a cold record. Thus, the Circuit Court's affirmance is inconsistent with the Supreme Court's rule, articulated in *Sandstrom*

v. Montana, 442 U.S. 510, 526 (1979), that an appellate court must reverse if the jury could reasonably have understood the instruction to convey the improper meaning; an affirmance is not allowed simply because the jury might have misunderstood the instruction as not inviting it to disregard an element of the offense.

The Court of Appeals for the Seventh Circuit followed the Supreme Court's lead in *Toulabi v. United States*, 875 F.2d 122, 123 (7th Cir. 1989), where, on collateral review under 28 U.S.C. § 2255, it reversed a mail fraud conviction because "the jury *could have* based its verdict on the intangible rights doctrine, ... even though the indictment might have supported a verdict on a proper charge." See also *id.* at 124 (omission of element in instructions requires reversal, discussing *Henderson v. Kibbe*, 431 U.S. 145, 155-57 (1977)). Lesser relief cannot be proper in a direct appeal.

The appellant's challenge to this instruction cannot fairly be disparaged or dismissed as a hypertechnical attempt to "deconstruct" the jury charge. Slip op. at 17. The challenged instruction was no slip of the tongue; these words were intended to have import. Nor did the appellant's briefs disregard "the charge as a whole." *United States v. Brandon*, 50 F.3d 464, 468 (7th Cir. 1995) (quoting earlier cases). While the trial court twice told the jury that intent to defraud was an element of the offense, its final word on the subject, prefaced by an at-best ambiguous "However," offered an alternative. There is no avoiding the conclusion that this instruction was reversible error. The instructions in a wire fraud case must "apprise the jury that they could convict ... only if they found that [the defendant] committed the acts charged as part of the scheme to defraud with the specific purpose of defrauding [the victim]." *United States v. Kuecker*, 740 F.2d 496, 505 (7th Cir. 1984), quoting *United States v. Feldman*, 711 F.2d 758, 765 (7th Cir.), *cert. denied*, 104 S.Ct. 352 (1983). The instructions in this case deliberately failed to convey this requirement, by mistakenly telling the jury that it had an alternative to a finding of intent to defraud.

In any event, the lower court's instruction on "shifting an enormous risk" also was erroneous because it omitted the key requirement, as stated in *United States v. Dial*, *supra*, 757 F.2d 163, that the risk have been shifted "through deliberate misrepresentation," *id.* at 170, and thus without the victim's knowledge and consent. The contested instruction therefore was not even correct if somehow understood as a statement of how intent could be inferred from conduct of the kind the government theorized occurred in this case. The Circuit Court's opinion overlooks this additional problem.

By essentially taking back its instruction that this element of the offense had to be proven, the trial court committed error requiring a new trial. This Court should rehear this case and reverse the conviction.

3. The U.S. Court Of Appeals Has Sanctioned A Departure From The Accepted And Usual Course Of Judicial Proceedings By A Lower Court, Requiring The Exercise Of The Supreme Court's Power Of Supervision In That The Decision Below Upholding The Sentence Is Contrary To Circuit Precedent, And Misapplies The Guidelines.

Mr. Catalfo's sentence was increased by more than two years, to a total of 42 months, based on a "specific offense characteristic" of a $5 million to $10 million fraud loss under USSG § 2F1.1(b). Mr. Catalfo's own unauthorized trades caused no loss to his clearing firm, and there can be no real doubt that he intended no monetary loss. The entire loss figure was based on the $7 million obligation that the Stern firm incurred in fulfilling what it accepted as its obligation to cover the losses that Zimmerman caused when he continued to enhance his position after Mr. Catalfo closed his.[5]

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[5] Stern's loss that day was around $8.5 million, but the $1.2 million that Mr. Catalfo "earned" that morning was paid by GH, his clearing firm, to Stern, which cleared Zimmerman, to cover some of those losses. Hence, the net loss of approximately $7 million.

Over defense objection, Judge Hart held Mr. Catalfo responsible for the Zimmerman losses on the following basis:

> The evidence at trial ... supports that Catalfo and Zimmerman conspired together. The loss caused by Zimmerman's part of the scheme was not unforeseeable. The loss amount is properly calculated and does not overstate the seriousness of the crime in which Catalfo was involved.

L.A.R. 30(a) Appx., at SA7. The opinion below fails to correct the legal error in determining "relevant conduct" on which this conclusory finding is based -- an exclusive focus on foreseeability, without attention to the proven scope of the underlying agreement.

The relevant conduct rule, USSG § 1B1.3, does not permit the court to hold a particular defendant responsible for the full size of a conspiracy's activities, simply because he knew, in general, that it could be very large. *United States v. Edwards*, 945 F.2d 1387, 1403 (7th Cir. 1991), *cert. denied*, 112 S.Ct. 1590 (1992). The appropriate finding is not simply that there was a conspiracy; *see* slip op. at 24 ("only one conspiracy existed that Catalfo, as one of only two conspirators, necessarily joined i[n] to its full extent"). It does not "necessarily" follow at all that because Mr. Catalfo shared in the criminal agreement to obtain the backing of CBOT clearing firms by fraud that he "jointly undert[ook]," USSG § 1B1.3, the full dollar scope of Zimmerman's lunatic trading strategy. There is nothing inconsistent between Catalfo's conviction for conspiracy with Zimmerman to defraud GH and Stern (to some extent) and his sentencing claim that the government did not show an agreement to join in Zimmerman's "intergalactic levels of trading." Slip op. at 22. The lower court's finding completely failed to focus on the extent of the particular defendant's knowing agreement, as required under *Edwards*. In upholding that rather casual finding, the Circuit Court's opinion conflicts with many precedents of Seventh Circuit.

This case cannot be distinguished in principle from the many cases, some quite recent, in which the Seventh Circuit

has remanded for more careful analysis under USSG § 1B1.3. Compare *United States v. Blackwell*, 49 F.3d 1232, 1234-35 (7th Cir. 1995) (defendant personally involved in a third of group's fraudulent transactions and knew of full scope of others' activities, although not of every transaction; accomplice attribution upheld), with *United States v. Willis*, 49 F.3d 1271 (7th Cir. 1995) (attribution of relevant conduct reversed). As the Court wrote in *Willis*, "it is highly questionable to leap from one person's knowledge that the organization is big to knowledge of its full scope." *Id.* at 1274. See also *United States v. Smith*, 26 F.3d 739, 747 (7th Cir. 1994) (vacating sentence based on insufficient finding of defendant's knowledge of and involvement in full scope of conspiracy); *United States v. Goines*, 988 F.2d 750, 777 (7th Cir. 1993) (same). In upholding a substantial upward adjustment under USSG § 2F1.1(b) on the basis of foreseeability alone, without regard to the lack of proof of the scope of Mr. Catalfo's agreement with Zimmerman, the opinion below permits a departure from its own cases.

If greater relief is not granted, the sentence must be vacated and the case remanded for resentencing.

4. The Trial Court Abused Its Discretion By Excluding Critical Defense Evidence And Violated Defendant's Due Process Rights Under Amendment 5, U.S. Constitution Because Defendant Was Not Permitted To Present His Theory Of Defense.

Anthony Catalfo's defense was essentially that of good faith. He denied having schemed with Darrell Zimmerman to defraud the clearing firms and swore that he always believed he could cover his positions. Yet the trial court refused to allow the defense to introduce documents establishing that Darrell Zimmerman had been forced by his prior clearing house (prior to Stern) to get therapy, and that he was kicked out of a clearing house and the firm thought he was a clear danger to

clearing firms and the exchange. Tr. 1018-25. The court excluded this testimony on the basis of relevance.[6]

Counsel's offer of proof under Fed.R.Evid. 103(a)(2) argued that this evidence was relevant to show that Zimmerman was capable of excessive trading on his own, thus showing that he did not need Mr. Catalfo to succeed in any "scheme" to defraud a clearing firm. This would have supported the defense claim that whatever Zimmerman may have been doing on October 22, Anthony Catalfo was simply trying to profit from a trading strategy that was adventurous and risky but entirely above-board and lawful. The testimony would likewise have corroborated the defendant's testimony that Zimmerman was entirely capable of deceiving the defendant, as well as others, about his trading intentions. As a result of the lower court's ruling, the defendant's testimony stood alone and uncorroborated.

Similarly, the trial court sustained the prosecutor's objection to allowing the defendant's mother to testify about the extent of her wealth and what she would have given her son if he needed it. Again, the basis of exclusion appears to be relevancy. Tr. 962. This testimony would have corroborated and thus confirmed the sincerity and reasonableness of Mr. Catalfo's testimony that he had no intent to defraud his clearing firms, and always intended to cover any losses, which he could do, if necessary, by turning to his wealthy mother for support.

These rulings excluding critical defense evidence constituted an abuse of the lower court's discretion. In *United States v. Peak*, 856 F.2d 825, 832-36 (7th Cir.), *cert. denied*, 488 U.S. 969 (1988), the Court reversed a conviction on account of a similar exclusion of admissible testimony that would have tended to disprove the allegation of criminal intent. By

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[6] At first, the court refused to allow the testimony on the basis that the proffered documents were not proper business records. After reviewing a defense memorandum, the court agreed that the evidence was not inadmissible on that basis. Tr. 1425-28.

precluding all defense efforts to corroborate the defendant's own testimony, the lower court left the defense in the unfair position of seeming to have nothing but Mr. Catalfo's word to rely on, a situation ably exploited by the government in closing. See *United States v. Hughes*, 970 F.2d 227, 234 (7th Cir. 1992). Accordingly, the exclusion of defense evidence was prejudicial to the defense. The Court of Appeals affirmed on the basis of relevancy. Slip op. 20-22. This exclusion prohibited defendant from presenting his theory of defense in violation of defendant Catalfo's due process rights under Amendment 5 U.S. Constitution. Catalfo's mother's testimony would have addressed Catalfo's state of mind and the question of intent. In our society it is a common practice for a mother to come to the support of her child. The jury was deprived of this information. The jury was deprived of this information and the opportunity to weigh her truthfulness. The prosecution could have presented opposing evidence. It did not happen. Catalfo was constitutionally deprived by a relevancy ruling. *Rock v. Arkansas*, 107 S.Ct. 2704 (1987); *Crane v. Kentucky*, 106 S.Ct. 2142 (1986).

CONCLUSION

For the foregoing reasons petitioner Anthony P. Catalfo prays that this Court grant his petition for a writ of certiorari, vacate the judgment below, and remand to the United States District Court with instructions to dismiss or grant a new trial or resentence.

Respectfully submitted,

ANTHONY P. CATALFO
Petitioner, Pro Se

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 94-2562

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ANTHONY CATALFO,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 93 CR 514-01 — **William T. Hart,** *Judge.*

ARGUED MARCH 27, 1995 – DECIDED AUGUST 30, 1995

Before FLAUM and MANION, *Circuit Judges,* and SHARP,* *District Judge.*

FLAUM, *Circuit Judge.* Defendant Anthony Catalfo was convicted on six counts of wire fraud under 18 U.S.C. § 1343 for his trading activities at the Chicago Board of Trade on October 22, 1992, and sentenced to 42 months imprisonment.

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* The Honorable Allen Sharp, Chief Judge of the United States District Court for the Northern District of Indiana, sitting by designation.

On appeal, Catalfo challenges both his conviction and sentence. We affirm.

I.

In 1992, Anthony Catalfo came to Chicago to learn about the options market. He enrolled at the International Trading Institute ("ITI") in April, entering their "Lab Tech" program, which allowed students to attend classes on basic options trading tuition free in exchange for six months of work.

At ITI, Catalfo met Donald Zimmerman, who taught classes there and traded on his own. Zimmerman soon became Catalfo's mentor and friend, the two of them often socializing and working together during the summer of 1992. In June, Catalfo and another student, Mark Mason, pooled $30,000 of their own money and agreed to have Zimmerman trade with it at the Chicago Board of Trade ("CBOT"). Zimmerman leased a Commodity Option membership at the CBOT so he could trade with the funds, while Catalfo functioned as Zimmerman's clerk and watched him work. Zimmerman tripled the $30,000.

Also during the summer, according to the government, Catalfo and Zimmerman developed a strategy to make their fortune in U.S. Treasury bond futures and options. A future is a contract for the sale of a specified quantity of a commodity, in this case Treasury bonds, at a given date. A person buying a futures contract believes the market will rise, while a person selling futures believes it will decline. An option, on the other hand, is a contract for the sale of an underlying futures contract at a set price at a given date. Options are either puts or calls. A put is an option to sell the contract at a set price, known as the "strike" price, before a given date. A call is an option to buy the contract at a given price before a given date. A person who purchases puts or sells calls generally believes the market will decline or is hedging against such a decline. Conversely, a person who purchases calls or sells puts believes the market will rise.

Catalfo and Zimmerman's plan focused on the purchase of Treasury bond puts and sale of Treasury bond futures contracts in massive quantities. They reasoned, in line with elementary principles of mass psychology, that such large-scale investment in a downward-looking position would cause other traders to think the market was going down and to act accordingly. With everyone believing the market would decline, it would, thus making their initial positions increasingly valuable. Before other traders realized what had happened, Catalfo and Zimmerman planned to exit the market by purchasing offsetting calls and collecting their profits.

Commodity traders often hedge their market speculations by executing offsetting trades going in the opposite market direction, thereby reducing their potential profits but also their risks. For example, a person purchasing bond futures contracts might offset those purchases with positions that envision a market decline, such as a sale of call options or a purchase of put options. What Catalfo and Zimmerman planned to execute is known as a "Texas hedge." In a Texas hedge, all one's market positions anticipate the market moving in the same direction—such as the purchase of put options and sale of bond futures. A Texas hedge is thus really no hedge at all.[1]

In addition to talking about such trading strategies, Catalfo apparently made a dry run of such a scheme while at ITI. ITI uses as a teaching tool a simulator called Trade$tar. Trade$tar is a computerized, interactive voice-activated simulator for trading futures and options. One day, about three weeks after Catalfo started at ITI, Catalfo was discovered making huge trades on the Trade$tar by purchasing thousands of puts and selling thousands of shares of the stock underlying the puts—a Texas hedge. An ITI instructor warned Catalfo that if he

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[1] Such a strategy is also referred to by traders as an "O'Hare spread"; "[t]he idea is to bet on an insanely large position and head to the airport. If at the end of the day the position makes money, you head to Hawaii; if it loses, it's off to South America." Ted C. Fishman.... *Almost*, Worth 72 (December/January 1994).

traded in real life the way he was trading on the simulator, he would be "taken away either in handcuffs or on a stretcher."

In order to trade on the floor of the CBOT, a trader needs a clearing firm. Clearing firms are members of the CBOT and guarantee their customers' trades on the basis of security put up by the customer. Zimmerman, who had had a history of trouble with clearing firms, had executed his trades with Mason and Catalfo's money through the Transmarket Group clearing firm. At the end of July, however, Transmarket asked Zimmerman to leave. On July 30, 1992, Zimmerman contacted the clearing firm of Len B. Stern & Co. to trade there. Zimmerman talked to Stern's general manager, Marvin Parsoff, and was able to secure a position there with a series of misrepresentations. Zimmerman told Parsoff that he had left Transmarket because they were cutting back on options traders (he had been asked to leave because of his trading habits) and that he had a net worth of $100,000 (he had negative bank account balances). Zimmerman also promised that he was a small trader who would keep his market positions "delta neutral," meaning that the positions would offset one another and be risk free. Parsoff agreed to clear Zimmerman's trades, and Zimmerman transferred his Transmarket account—$40,000 in bond and soybean option positions with offsetting futures—to Stern.

Soon after the transfer, Parsoff learned that Zimmerman still had an outstanding debit balance with another trading firm as a consequence of trading losses totaling nearly $75,000. Parsoff also discovered that Zimmerman had stopped making payments on the debt a few months earlier. Parsoff responded by telling Zimmerman that he wanted Zimmerman's account moved out of Stern and that Zimmerman should cease trading. Zimmerman replied that he was leaving for Germany and asked Parsoff if he could leave the account open until he returned. Parsoff agreed but restricted the account to a "liquidation only" trading parameter, meaning that Zimmerman could only trade out of the positions he had already placed or make small adjustments to keep them delta neutral. While Zimmerman was in Germany, Catalfo

and Mason controlled the account and liquidated it down to the point where all that remained was $500 in risk-free bean options.

Also at the end of July, Catalfo applied for a full membership at the CBOT so that he could trade there. He contacted the clearing firm of Goldenberg, Hehmeyer & Co. ("GH"), and asked if they would sponsor his application and become his clearing firm. Catalfo first met with Ralph Goldenberg, one of the principals of GH, who discussed with him the credit limits GH extended to its customers: three times the net liquidating value of his account up to a maximum of $150,000. Catalfo apparently understood this, or at least never indicated that he did not. Catalfo later met with Chris Hehmeyer, GH's other principal, and told Hehmeyer that he intended to trade in offsetting contracts with very small price differentials between them, a practice known as "scalping." Scalping offers a low rate of return but also involves comparably little risk. Goldenberg and Hehmeyer agreed to sponsor him and to let him use GH as his clearing firm.

In the course of doing a routine background check on his CBOT membership application, CBOT's Membership Services Department discovered that Catalfo had an unpaid student loan owed to New York State and that a judgment had been entered against him for that debt. The CBOT application requires the disclosure of all unpaid debts and judgments, and Catalfo had not mentioned the student loan. On detecting the discrepancy, the CBOT held Catalfo's application in abeyance pending resolution of the problem. Catalfo then contacted the New York student loan center, which responded by sending him a telefacsimile indicating that the debt had been paid in full on August 5, 1992. Catalfo, in turn, submitted the facsimile to the CBOT, which accepted the explanation and continued processing his application.

On October 13, 1992, Catalfo met with Hehmeyer to fill out a customer agreement form and other trading documents with GH. Catalfo indicated on the form that he had a net worth of between $50,000 and $100,000, risk capital of

$80,000 available,[2] and that no other person had a financial interest in his account. The form also contained a question concerning the customer's limit of margin exposure, which Catalfo left unanswered. Hehmeyer indicated at trial that "[t]he question about margin I don't necessarily have to have from an individual because it is not a hedging operation and it is not a margin call where we would have to be calling a business and getting margins sent in by wire." Goldenberg likewise noted in his testimony that the question did not worry him "because we felt we would have tight control as to what his positions would be and what exposure he would have" and that his discussions with Catalfo had led him to that conclusion. Catalfo similarly reaffirmed his scalping intentions to Hehmeyer while signing the form. The customer agreement otherwise required Catalfo to "affirm[ ] that he is able to assume the financial risks of commodity futures trading" and that he "will at all times maintain collateral and margin for all accounts as from time to time may be required by" GH in its "sole discretion."

In the interim, Catalfo and Zimmerman began laying ground work for their eventual trades. The two let it be known that they planned on trading in large amounts, and Zimmerman indicated to one bond futures broker, Larry Israel, that he had financial backing from a wealthy Canadian source. Zimmerman additionally asked Israel a number of "hypothetical questions" about making large bond futures trades. Zimmerman and Catalfo also spoke with Terry Mulville, a bond options broker, telling him that they were planning to trade options in large quantities and asking him whether, if he were to serve as their broker, he could handle such orders.

Catalfo and Zimmerman picked October 22 as the day for their big trade. On that day, the Labor Department was to release its latest unemployment figures at 7:30 am Chicago time. Catalfo reasoned that the numbers would show an overall improvement in the employment picture because of

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[2] In reality, Catalfo had about $55,000 in his bank account at this time.

the impending election; he thought the administration would try to make things look better than they were and then correct the numbers after the first Tuesday in November. Such a positive unemployment figure would, however, drive down Treasury bond futures and options—thereby improving their market position.

On the evening of October 21, 1992, Dan Himmel, a friend of Catalfo, and Catalfo's brother Larry, arrived from New York. Catalfo and Zimmerman described what they were planning to do the next day, calling it a Texas hedge, and how much money they were going to make, and invited the two to join them on the trading floor the next day. Catalfo specifically indicated to the visitors that he and Zimmerman planned to split their profits in the event one lost and the other made money. Catalfo also told Himmel that they were not going to "give up the house" when they traded, meaning that the persons they sold to would not know that Catalfo and Zimmerman were on the other side of the trade. The last bit troubled Himmel, but Catalfo assured him that it was legal, although only "borderline ethical and you wouldn't do that to somebody who you are going to do business with in the future." Additionally, Catalfo told Himmel that he only had $30,000 in his account and Zimmerman only $600, or perhaps a $600 deficit.

The next morning, Zimmerman and Catalfo arrived at the CBOT accompanied by Himmel and Larry. Zimmerman deposited a worthless check for $50,000 in his account at Stern. At about 7:15, Catalfo and Zimmerman approached Mulville and they gave him a verbal order to purchase 6,000 bond option puts, the order to be executed before 7:30. Zimmerman then left and went to conduct further business, at which point Mulville realized that the huge trades were for Catalfo only.

The Treasury bond option pit opened at 7:20. Between 7:20 and 7:29, Mulville purchased 4,112 put options on Catalfo's behalf, options with a premium cost of $2.1 million. At 7:30, the Department of Labor released its monthly unemployment statistics, and the results were, as Catalfo predicted,

optimistic. Bond futures prices had begun to plummet at 7:29, and they continued to fall in the wake of the news. Catalfo then had Mulville sell his positions, and by 7:40, Catalfo was "flat" in the market, having made a profit in excess of $1 million. Catalfo then moved to the bond pit and bought 100 futures contracts.

Also beginning at 7:20, Zimmerman placed orders for the purchase of 24,000 puts on the other end of the pit, options with an associated premium cost of $14.6 million. Zimmerman also sold, through Israel, 12,500 bond futures contracts in the bond pit, the bonds having a face value of almost $1.2 billion, of which he bought back only 800.[3]

At about 8:00 a.m., everything began to unravel. A representative of the CBOT Office of Investigation approached Catalfo and asked him about his brother and Himmel. Catalfo initially denied any relation to the two men but conceded after some additional questioning that one of the two was his brother. After learning that Catalfo had purchased 100 bond futures contracts and hearing rumors of his massive trading, Goldenberg and Hehmeyer summoned Catalfo from the trading floor. After examining his trading, they asked him whether he knew Zimmerman and if they had talked. Catalfo gave affirmative answers but was not particularly responsive. Hehmeyer asked Catalfo, "Do you want me to call the U.S. Attorney's Office?". Catalfo replied, "I am not answering any more questions." Hehmeyer accused Catalfo of a "breach of trust" and Catalfo left the office. Hehmeyer then directed that Catalfo's 100 futures contracts be sold and his trading privileges be revoked.

Meanwhile, the same representative who had spoken with Catalfo also questioned Zimmerman. Zimmerman asserted that Himmel and Larry Catalfo were his backers and that he would be splitting his trading profits with them. Zimmerman,

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[3] Unlike Catalfo, who had full membership trading privileges, Zimmerman was not authorized to trade in the bond pit unless he was hedging options trades. something he clearly was not doing.

Himmel, and Larry Catalfo were then escorted from the CBOT floor to Stern's office. Parsoff confronted Zimmerman, who again said that the two men were his backers, fund managers from New York who had "family money." Parsoff demanded $10 million from Zimmerman to cover the trades, to which Zimmerman responded by saying, "We'll just make the call," picked up the receiver and handed it to Himmel. Himmel dialed a number (his sister in New York) and then hung up before the call was completed. The other two left but Zimmerman remained with Parsoff in the office, making two calls to Catalfo's apartment, the first at 9:28, which lasted 52 seconds, and the second at 10:40, which lasted 6 minutes and 54 seconds.

With Zimmerman off the floor, Parsoff and other Stern employees tried to piece together what Zimmerman had been doing and then frantically began liquidating Zimmerman's positions. Other traders, who had watched the massive purchases earlier, realized what was happening and moved in for the kill. By the time Stern had disentangled itself from Zimmerman's trades, it had lost $8.5 million, $2 million more than the company's net worth. In one morning of trading, Zimmerman had destroyed an entire clearing firm.

Later that same day, at about 11:30 a.m., Catalfo withdrew approximately $16,500 from his bank account. Around noon, Catalfo met Zimmerman and gave him $1,000 cash. Catalfo, his brother, and Himmel flew back to New York that evening. The next day, Catalfo twice called GH from New York. In the first call, Catalfo requested that his trading profit be sent to him in New York. GH told him that his account was frozen. Shortly thereafter, Catalfo called again to ask about how much money he had in the account. These calls to GH came after Catalfo had spoken with Zimmerman twice.

On July 21, 1993, Catalfo and Zimmerman were charged in a six count indictment with engaging in a scheme to defraud and to obtain money and property by and through fraudulent means in violation of 18 U.S.C. § 1343. Catalfo pled innocent and defended the charges at trial, while Zimmerman fled to

Canada. Following a ten-day trial, a jury convicted Catalfo on all six counts, and he was sentenced to forty-two months imprisonment.

II.

Catalfo raises a number of issues relating to his conviction. First, he asserts that his scheme to defraud was not one cognizable under the wire fraud statute and that his alleged uses of the interstate wires were unrelated to that scheme. Second, he contends that the court improperly instructed the jury that it could convict him of fraud simply for imposing a substantial risk of loss on another without actually finding that he intended to defraud anyone. Third, Catalfo argues that certain improprieties in the government's closing arguments rendered his trial unfair. Finally, he alleges that the trial court erroneously excluded certain evidence he had sought to introduce regarding his mother's wealth and Zimmerman's intentions.

A.

Catalfo argues that his conviction should be reversed as a matter of law because his trading activities simply did not constitute federal wire fraud as delineated in 18 U.S.C. § 1343.[4] He asserts that he did not defraud anyone of any tangible property and that his uses of the wires had no real connection to his alleged fraud. On both points, Catalfo essentially is challenging the sufficiency of the evidence against him. We review such challenges solely to determine whether a reasonable jury could have found the essential

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[4] Section 1343 provides in relevant part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits, or causes to be transmitted by means of wire . . . in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme, or artifice shall be fined under this title or imprisoned not more than five years, or both. . . .

elements of the crime beyond a reasonable doubt. *Jackson v. Virginia,* 443 U.S. 307, 316 (1979); *United States v. Theodosopoulos,* 48 F.3d 1438, 1449 (7th Cir. 1995).

Although Catalfo tried to make his money on the floor of the CBOT, the government did not seek to prove that his trading in and of itself constituted fraud. Rather, the government argued, Catalfo engaged in a scheme to defraud his clearing firm (and Zimmerman's) by subjecting the firms to the substantial risks their trading created. Catalfo did this by encouraging GH to believe that he intended to trade small and then using its backing to engineer his massive scheme.

Catalfo replies that he did not seek to profit from GH but rather on the floor of the exchange and that that difference places him beyond the reach of the wire fraud statute. He compares his case to *United States v. Walters,* 997 F.2d 1219 (7th Cir. 1993), in which we reversed the conviction of Norby Walters, an entertainment agent who had tried to secure the business of 58 college athletes still enrolled in school by giving them money and other valuables in exchange for exclusive agency contracts with him. The government charged Walters with fraud on the grounds that he had caused several universities to pay scholarship funds to athletes who had become ineligible as a result of the contracts, and we refused to consider that activity mail fraud. We noted that Walters had intended to profit only from legitimate market transactions and that his scheme only inflicted a loss on the universities as a tangential byproduct. *Id.* at 1227. Although he violated several collegiate athletic rules, Walters did not attempt to take money from the colleges or athletes illegally. Catalfo contends that he, like Walters, wanted to make money legally—in this case on the floor of the CBOT through proper transactions at the expense of other traders. Catalfo never directed false statements at those other traders; regardless of whether his trading was "borderline ethical" and whether he might have violated portions of the Commodity Exchange Act, *see* 7 U.S.C. §§ 6(a), 13, the indictment does not thus charge him.

We conclude Catalfo's activities fit within § 1343's prohibitions. Unlike Walters, whose profits were to be derived from his legitimate contracts, Catalfo sought his profit-based on collateral fraudulently obtained from someone else. "[J]ust as it is embezzlement if an employee takes money from his employer and replaces it before it is missed, . . . so it is fraud to impose an enormous risk of loss on one's employer through deliberate misrepresentation even if the risk does not materialize." *United States v. Dial,* 757 F.2d 163, 170 (7th Cir.), *cert. denied,* 474 U.S. 838 (1985); *see also United States v. Sanders,* 893 F.2d 133, 138 (7th Cir.), *cert. denied,* 496 U.S. 907 (1990); *United States v. Cosentino,* 869 F.2d 301, 307 (7th Cir.) (noting that the fraudulent deprivation of another's money is "no less a fraud because it was part of a scheme that might have generated a profit") *cert. denied,* 492 U.S. 908 (1989). In essence, Catalfo is not too much different from a clerk who "borrows" money out of the register to place a bet on a "sure thing" at the track. Catalfo just operated with a deeper till and wagered at a more sophisticated course.

Catalfo, relying on the Supreme Court's decision in *McNally v. United States,* 483 U.S. 350 (1987), additionally maintains that § 1343 does not embrace attempts to defraud someone of intangible rights. In *McNally,* the Court reversed a conviction where the prosecution sought to base a § 1341 case on the charge that the defendants had defrauded "the citizens and government of Kentucky of their right to have the Commonwealth's affairs conducted honestly." *Id.* at 353-54.[5] Catalfo asserts that even assuming he and Zimmerman deceived their clearing firms into providing them additional backing, this deception only violated an intangible right of honest dealing from its clients. Following *McNally,* however, the Court subsequently held in *Carpenter v. United States,* 484 U.S. 19, 25 (1987) that the statutes cover schemes to

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[5] Congress overruled *McNally* on this precise point by enacting 18 U.S.C. §1346, which provides "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." *See United States v. Bush,* 888 F.2d 1145 (7th Cir. 1989).

deprive someone of intangible property. *See also United States v. Cherif,* 943 F.2d 692, 697 (7th Cir. 1991), *cert. denied,* 503 U.S. 961 (1992). Unlike the *McNally* defendants. Catalfo defrauded GH of the right to control its risks. By means of deception, he caused GH to back his trading scheme, knowing that any loss would fall on its shoulders, not his own. The government did not allege or seek to prove that Catalfo deprived GH of any right to honest customers. Rather, he deprived GH of the right to control its risk of loss, which had a real and substantial value.

Catalfo next argues that he did not have a fiduciary relationship with GH that required him to divulge everything and respect its trading limits, thus distinguishing his case from *Dial* and *United States v. Ashman,* 979 F.2d 469 (7th Cir. 1992), *cert. denied,* 114 S.Ct. 62 (1993), in which brokers defrauded their clients of money. He points out that he had no margin limit placed on him and that nothing in the written agreement he signed with GH, an agreement that purports to integrate all promises made from one party to the other, prevented him from trading beyond his limited capital outlay. We disagree. Regardless of whether GH (and Stern) ought to have been more cautious in choosing its customers, trial evidence amply demonstrated that Catalfo lulled GH into believing he would trade at a small level, indicated that he only had assets to trade at a small level, and then traded as if he had huge capital resources by using his clearing firm's backing. Fraud remains fraud even if the victim should have acted more prudently.

Taking a slightly different tack, Catalfo asserts that the wire transmissions of which he is accused of causing to be made were not sufficiently "for the purpose of executing the scheme" as required by § 1343. The charged wire transmissions fall into three groups. Count One involved the New York State Higher Education Services Corporation's telefacsimile to Catalfo confirming that his student loans had been paid. Counts Two through Four concerned the numerous wire transmissions made by Dow Jones and other information services during Catalfo and Zimmerman's October 22 trading

ventures. Finally, Counts Five and Six related to telephone calls Catalfo made on October 23 to GH and to Zimmerman. We address each group in turn.

First, the CBOT had informed Catalfo that they had put his membership on hold because of an unpaid student loan. Catalfo contacted the student loan center to explain the alleged delinquency, and they responded by sending him a telefacsimile from New York to Chicago. The facsimile clearly traveled over interstate wires. Catalfo says that no evidence showed he intended that transmission to go over interstate wires or that he foresaw a facsimile transmission as opposed to the use of the mails or private overnight carrier.[6] We only require, however, that a defendant act with the knowledge that such a transmission is a reasonably foreseeable event attendant to his actions. *United States v. Brandon,* 50 F.3d 464, 467 (7th Cir. 1995). Catalfo asked the student loan center to send him information in Chicago so that he could receive his CBOT membership and execute his trades; without the fax, Catalfo would not have been able to trade. Catalfo asserts that we have slid down the slippery slope to such an extent that any action might seem to depend on some wire transmission. *See Reynolds v. East Dyer Development Co.*, 882 F.2d 1249, 1252 (7th Cir. 1989). That simply is not the case here.

Second, Catalfo and Zimmerman's trading scheme depended on others panicking as a consequence of their massive options and futures trading. Both Himmel's testimony and the evidence of Catalfo's activities on the Trade$tar program showed that Catalfo was well aware of this predictable consequence. Given this evidence, a jury could reasonably conclude that Catalfo knew that futures and options price information would be disseminated over interstate wires like those used by Dow Jones, Quotron, and Reuters and that his profit from his placing a risk on GH (and Sterns) depended on these interstate communications. *Cf. Cherif,* 943 F.2d at 696.

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[6] Had he received the information through the mail, the only difference in our discussion would likely be our attention to § 1341 instead of § 1343.

Third, Catalfo made two telephone calls to GH on October 23, the first asking for his money and the second confirming the amount of money in his trading account. Catalfo denies that these calls furthered the scheme because the scheme had ended when GH and the CBOT froze his account. We have held, however, that conversations occurring after the end of trading regarding the profitability of the trades could be in furtherance of an illegal scheme. *Sanders*, 893 F.2d at 138-39. Catalfo suggests that *Sanders* has little reasoning behind it and is in any event distinguishable because the traders there had not yet completed their fraud and ended their scheme, whereas here Catalfo's scheme had already collapsed at the time of these calls. Putting aside the suggestion to overrule *Sanders*, we believe that a jury could have understood Catalfo's calls as attempts to ascertain and collect the proceeds of the scheme and an important part of the plan. This is especially true in light of Catalfo's three telephone conversations with Zimmerman and his admission at trial that he still thought after he left the GH office that he would be able to collect the proceeds from his options trading.[7]

B.

Catalfo also argues that a jury instruction rendered his trial unfair. The indictment, following the language of § 1343, required a finding that he "knowingly intended to defraud another person." In instructing the jury, the court stated that this intent was a necessary element of the crime. A few paragraphs later, the court defined "intent to defraud" and then reiterated the intent requirement with a slight amendment:

> The phrase "intent to defraud" means that the acts charged were done knowingly with the intent to

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[7] Catalfo also argues that even if his call in Count Five, when he asked for his money, could be considered a part of the scheme, the follow-up call in Count Six. when he inquired how much money he had in his account, could not, since he then knew he could not lay his hands on the funds. Again, Catalfo's call may have been mere curiosity, but a jury reasonably could have concluded otherwise.

> deceive a potential victim, in order to cause the loss of money or property to the potential victim, or to cause a financial gain to the defendant.
>
> The wire fraud statute required proof that a defendant knowingly intended to defraud another person. However, the statute can be violated when an enormous risk of loss is placed on another person even though that person does not actually suffer an economic loss.

When the government proposed this elaboration, Catalfo objected, arguing that the phrasing in the second paragraph causes the second sentence to "defeat" the first by suggesting that imposing a large risk of loss of another will satisfy the government's burden of proof even where the defendant had no intent to defraud. The court disagreed with Catalfo's suggestion, replying, "I think that's right. I think that's what the law is in this Circuit. That's pretty clearly the law. . . . I think the instruction states what the situation is. I think the instruction is correct, sir."

In reviewing this issue, we note that appellate courts do not sit to deconstruct jury instructions. Whether a jury has been properly instructed "is to be determined not upon consideration of a single paragraph, sentence, phrase or word, but upon the charge as a whole." *United States v. Alexander,* 743 F.2d 472, 478 (7th Cir. 1984) *(quoting United States v. Lang,* 644 F.2d 1232, 1240 (7th Cir.) (as modified), *cert. denied,* 454 U.S. 870 (1981)). Although an inartful sentence can spoil a whole instruction, that is the exception rather than the rule.

The alleged confusion on this issue derives from the implications of our decisions in *Dial, Cosentino,* and *Sanders.* In those cases, we observed that the intent to impose a large risk on another person through deliberate misrepresentation could constitute the requisite intent to sustain a conviction under mail and wire fraud statutes. *Sanders,* 893 F.2d at 138; *Cosentino,* 869 F.2d at 307; *Dial,* 757 F.2d at 170. It is true, as Catalfo argues, that a defendant's imposition of risk on another person does not necessarily mean that the defendant

had the intent to defraud the other person; that factual scenario merely provides a reasonable juror a way, albeit a rather convincing way, to infer the intent. The challenged instruction states nothing more: "However the statute *can* be violated when an enormous risk of loss is placed on another person even though that person does not actually suffer an economic loss."

Catalfo asserts that the use of the word "However" transformed that sentence from an explanation of what might underlie intent to a replacement of the previous definition or at least rendered the sentence ambiguous. We disagree. "However" served merely as a connector. A speaker or writer can use "however" to create an alternative to the preceding thought, and if the disputed paragraph stood alone as the only reference in the jury instructions to intent, we might be more receptive to Catalfo's contentions of ambiguity. But in the context of this case, where the court had repeatedly declared "intent" to be a necessary element of the case and made no inaccurate statement of law, no reasonable juror could have been misled regarding the necessary finding of intent. *Brandon,* 50 F.3d at 468 (7th Cir. 1995).

C.

Catalfo next contends that the government committed reversible error in its rebuttal closing argument by calling Catalfo a liar, appealing to the jury members to view themselves as "victims" of Catalfo's lies, and improperly vouching for government witnesses.[8] Catalfo also claims that these

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[8] The government attorney began his rebuttal as follows:

> What's so hard about telling the truth to somebody. That's what this case is all about. That's what we should expect from every witness on that stand.
>
> Mr. Catalfo was distrustful of the Government at this point, and that's why he was acting the way he did on the stand.

(Footnote continued)

remarks went beyond the proper scope of any rebuttal. Catalfo did not object to closing argument at trial, making our review for plain error only. FED.R. CRIM.PRO. 52(b); *United States v. Olano,* 113 S.Ct. 1770, 1779 (1993).

The government's arguments were not improper. Where the character and credibility of the defendant are at issue and the evidence allows the inference that the defendant has been less than truthful, the prosecutor does not err in closing argument by referring to the defendant as a liar. *See United States v. Goodapple,* 958 F.2d 1402, 1409-10 (7th Cir. 1992); *United States v. Spivey,* 859 F.2d 461, 465-66 (7th Cir. 1988); *United States v. Holt,* 817 F.2d 1264, 1275-76 (7th Cir. 1987); *United States v. Chaimson,* 760 F.2d 798, 811 (7th Cir. 1985); *see also United States v. Dean,* 55 F.3d 640, 665 (D.C. Cir. 1995). The prosecutor can go too far if her references to the defendant's veracity are intemperate and excessive, *Chaimson,* 760 F.2d at 811, but that is not the case here. Moreover, the rebuttal itself made up a comparably small portion of the government's closing arguments—the government's explanation of its entire fraud case was much lengthier. Indeed, the extent of the government's remarks here (four references to Catalfo as a liar in fifty pages of closing arguments) was similar to that considered acceptable in *Chaimson,* where we held that three references to the defendant as a liar in the space of a forty-eight page closing argument did not cross the line of prosecutorial misconduct, *see id.; see also United States v. Jungles,* 903 F.2d 468, 479 (7th Cir. 1990) (three references to defendant as a liar in closing argument deemed not to be improper). Furthermore, the *Chaimson* defendant had objected to the government's remarks below, whereas

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> All he did was get up there and lie to you time and again, because that's what's important to him to make you the latest of his victims, to make sure you also believe his lies.

In the whole of his argument, which extends over less than ten pages of a trial transcript in excess of 1500 pages (compared to forty pages for the government's initial closing argument), the government referred to Catalfo as a liar four times.

Catalfo did not; there was no plain error here. *See also Jungles,* 903 F.2d at 479 (holding that, even though review was for plain error, government's references were proper).

The same can be said of the government's lone veiled invitation to the jury to consider itself another victim of Catalfo's fraud and its comments on the credibility of government witnesses. Comments on the credibility of witnesses are permissible so long as the comments are based on proper inferences gleaned from the evidence at trial. *United States v. Patterson,* 23 F.3d 1239, 1250-51 (7th Cir. 1994), *cert. denied,* 115 S.Ct. 527 (1994); *Goodapple,* 958 F.2d at 1409-10. After Catalfo related a version of events that conflicted with the testimony of Himmel and other government witnesses, the prosecutor legitimately could argue that the jury should believe one and not the other, so long as he did not personally vouch for the honesty of the witness on whom he was relying, which he did not do. Inviting the jury to consider itself a victim, while perhaps itself an unfortunate intimation, did not render an otherwise fair trial unfair, certainly not plainly so, as our standard of review requires. Moreover, we ordinarily presume that the court corrected any error, of which there was none, by instructing the jury as it did that "[o]pening statements, closing arguments and other statements of counsel should be disregarded to the extent they are not supported by the evidence." *See Rodriguez v. Peters,* No. 93-3724, *slip op.* at 21 (7th Cir. August 15, 1995).

Finally, the government did not inappropriately use rebuttal to raise new arguments to which Catalfo could not respond. Catalfo's attorney asserted in his closing that the jury should believe Catalfo and discredit the words of most of the government witnesses; the government's rebuttal simply and understandably countered that argument.

D.

Catalfo also asserts that the district court erred in excluding certain evidence on grounds of relevancy. *See* FED.R.EVID. 401. At trial Catalfo sought to introduce documents that would show that Zimmerman had been forced by a previous

clearing house to get therapy and asked to leave another clearing house that thought him a danger to clearing firms and the exchange. This evidence, Catalfo argues, would have shown that Zimmerman was capable of excessive trading on his own and that he did not need Catalfo to develop a scheme to defraud a clearing firm. Catalfo also tried to introduce the testimony of his mother, who would have stated that she was very rich and would have given him any money needed to cover any losses. This proof, Catalfo asserts, would have shown that he never intended to defraud the clearing firm. We review the exclusion of evidence for abuse of discretion. *Jackson v. Bunge Corp.*, 40 F.3d 239, 246 (7th Cir. 1994).[9] Error may not be predicated upon a ruling which excludes evidence unless the exclusion affects a substantial right of the party affected. FED.R.EVID. 103(a).

Neither contention has merit. First, testimony on both points was elicited during direct and cross examination. Government witnesses testified about Catalfo's mother's wealth and support of her son, while Catalfo stated on cross-examination that Zimmerman "needed to go to psychotherapy, you know, that he blew out of different places, things of that nature I now know, that he blew out—like five or six other clearing firms." To that extent, jurors had these issues before them. Second, neither line of inquiry was relevant. Catalfo did not reach the conclusion that Zimmerman was an unstable person until after October 22. All that evidence about Zimmerman could show is that Zimmerman could have acted on his own; it would not tend to prove that Zimmerman was less likely to have a co-conspirator. With regard to Catalfo's mother, she had no legal obligation to repay GH for any losses and Catalfo had never told GH that she would provide collateral for any losses—a clearing firm would have had no right to rely on that promise; indeed, it would likely have been unreasonable for it to do so.

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[9] The government also argues that any error in this regard was harmless under FED.R.CRIM.PRO. 52(a). Because we can discover no impropriety in the district court's ruling, we do not reach the question of harmless error.

Catalfo also argues that he suffered because even though he was able to mention these defenses in his own testimony, he was not able to corroborate that testimony. Thus, he argues, he was allowed to argue points and then not back them up; the jury heard Catalfo say that his mother would support him and then his mother did not even testify on his behalf. Catalfo contends that our decision in *United States v. Peak*, 856 F.2d 825 (7th Cir.), *cert. denied*, 488 U.S. 969 (1988), compels the grant of a new trial on these points. In *Peak*, the court had permitted one defendant to testify only to his side of a conversation with a co-defendant in which the first defendant had proposed a scheme to capture an individual. What the jury did not learn, because of the improper exclusion of the other side of the story as hearsay testimony, was the second defendant's response that "this was the craziest idea he had ever heard." *Id.* at 833. This testimony would have provided the sole and best evidence negating the second defendant's intent; "Without it, he had little chance of acquittal; with it, he could have placed some doubt in jurors' minds as to his intent." *Id.* at 835. Catalfo's protestations to the contrary, little similarities exist between the situation in this case and that in *Peak*.[10]

III.

Finally, Catalfo argues that the district court improperly enhanced his sentence under U.S.S.G. § 2F1.1(b)(1)(0) by holding him accountable for the $7 million loss suffered by Stern. Catalfo contends that his activities caused nobody any loss and that Zimmerman alone should be held accountable

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[10] We additionally note that far from harping on the fact that Catalfo's mother did not testify, the government's closing argument emphasized how unimportant her money was: "You see, ladies and gentlemen, when Mr. Catalfo and Mr. Zimmerman walked in to [sic] those pits clearing those firms, it's irrelevant to the brokers . . . how much money they have got, how much money their moms have got, how much money their brothers have got. That's irrelevant." Similarly, in rebuttal closing argument, the government stated: "And then he comes in with the—well, my mom has got a lot of dough. What does this have to [sic] with the case? Absolutely nothing."

for what he wrought. Catalfo admits that he and Zimmerman had planned to split their winnings but denies that he could have reasonably foreseen Zimmerman's intergalactic levels of trading in furtherance of their conspiracy as is required under U.S.S.G. § 1.B1.3(a)(1)(B).

Under U.S.S.G. § l.Bl.3(a)(l)(B), a defendant can be sentenced for his own acts and "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity." The district court found that Catalfo conspired with Zimmerman and that Zimmerman's losses were foreseeable. It thus held Catalfo responsible for the $7 million dollar loss Zimmerman's clearing house sustained (equal to Zimmerman's $8.5 million loss less Catalfo's $1.4 million gain). *See* U.S.S.G. § 9F1.1(b). We review the court's findings on the amount of loss for clear error only. *United States v. Dillard,* 43 F.3d 299, 309 (7th Cir. 1994).

Catalfo asserts that the court made only general findings regarding foreseeability, findings that are inadequate under *United States v. Edwards,* 945 F.2d 1387 (7th Cir. 1991), *cert. denied,* 503 U.S. 973 (1992). In *Edwards,* we stated that district courts should "set[ ] forth the reasons why the particular amount of [loss] was reasonably foreseeable to [the defendant]." *Id.* at 1399. Precise explanations are obviously preferred because they aid review of sentencing decisions and more fully inform a defendant of the reasons underlying his sentence. *Id.* However, a lack of specific findings does not automatically require a remand for reconsideration. *Compare United States v. Goines,* 988 F.2d 750, 777 (7th Cir.) (remand necessary where court made no specific findings before holding all co-conspirators liable for the amount of cocaine involved in the entire conspiracy), *cert. denied,* 114 S.Ct. 241, 483, 558 (1993) *with United States v. James,* 40 F.3d 850, 872 (7th Cir. 1994) (court gave no specific reasons for its findings but record adequately supported them), *cert. denied,* 115 S.Ct. 948, 1160 (1995) *and United States v. Mojica,* 984 F.2d 1426, 1445 (7th Cir.) (affirming decision based on generic findings because the defendant presented no evidence substantiating his claim of error), *cert. denied,* 113 S.Ct. 2433

(1993); *see also Edwards,* 945 F.2d at 1400-03 (affirming some sentences and remanding others, all based on the same boilerplate language).

While the court's findings in this case appear very general, they are nonetheless sufficient. In this case, as opposed to the multi-defendant drug conspiracy involved in *Goines,* only one conspiracy existed that Catalfo, as one of only two conspirators, necessarily joined it to its full extent. The only question is whether he could have foreseen Zimmerman's actions. The district court answered this query in the affirmative but without specifying its reasons for doing so. We must therefore inquire whether Catalfo has "offered [a] meritorious argument[] for remanding [his] case[]." *Edwards,* 945 F.2d at 1400.

"Reasonable foreseeability refers to the scope of the agreement" that Catalfo assented to, not the specific transactions he expected Zimmerman to make. *See United States v. Flores,* 5 F.3d 1070, 1083 (7th Cir. 1993), *cert. denied,* 114 S.Ct. 884 (1994). Catalfo argues that the only evidence pertaining to the extent of the agreement between himself and Zimmerman indicates that Zimmerman conducted his losing trades on his own initiative after Catalfo had liquidated his position. Thus, Catalfo maintains, he could not have foreseen Zimmerman's losses. *See* Ted C. Fishman, . . . *Almost,* WORTH 72 (Dec./Jan. 1994) (attached to Catalfo's presentence report). While Zimmerman's acting by himself is a possible reading of the events, it is not the only permissible one. Indeed, trial evidence, as well as the above noted article, showed that Catalfo and Zimmerman plotted for months and discussed making trades thousands of times larger than their past activities. As Zimmerman explained their plan in the article, "We were going to take down the world financial system . . ." Carrying out this plan depended the actions of both men. Furthermore, Catalfo and Zimmerman agreed to split their profits in case one of them lost money, and nothing indicates that the men agreed to stop at any certain point. Based on all of this evidence, the district court did not clearly err in finding that Catalfo could have foreseen Zimmerman's conduct and the resulting possible loss.

For the foregoing reasons, Anthony Catalfo's conviction and sentence are affirmed.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

November 16, 1995

HON. JOEL M. FLAUM, Circuit Judge

HON. DANIEL A. MANION, Circuit Judge

HON. ALLEN SHARP, Chief Circuit Judge*

UNITED STATES OF AMERICA, Plaintiff-Appellee, No. 94-2562 v. ANTHONY CATALFO, Defendant-Appellant.	] Appeal from the] United States] District Court for] the Northern] District of Illinois,] Eastern Division.]] No. 93 CR 514]] William T. Hart,] Judge.

O R D E R

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause on September 13, 1995 by defendant-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing and suggestion for rehearing *in banc* be, and the same is hereby DENIED.

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* The Honorable Allen Sharp, Chief Judge of the United States District Court for the Northern District of Indiana, sitting by designation.

APPENDIX C

By letter dated March 11, 1996, the Clerk informed petitioner as follows:

Re: Anthony Catalfo
v. United States
Application No. A-745

Dear Mr. Catalfo:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Stevens, who on March 11, 1996, extended the time to and including April 14, 1996.

This letter has been sent to those designated on the attached notification list.